IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8422 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE R.R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MOHMDKHAN RUSTOMKHAN

Versus

A'BAD MUNICIPAL CORPORATION

Appearance:

MR MH BAREJIA for Petitioner
MR PG DESAI for Respondent No. 1
DS AFF.NOT FILED (R) for Respondent No. 2, 3

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE R.R.TRIPATHI

Date of decision: 07/11/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE B.C.PATEL)

#. The petitioner has approached this Court by filing the present petition against the Ahmedabad Municipal Corporation and two others for various reliefs. From the contents of the petition, it appears that his grievance was that he was a tenant of a cabin. For the purpose of widening the road, the Ahmedabad Municipal Corporation was likely to take action for removal of the Pan Shop, i.e. cabin. Learned Single Judge admitted the petition and granted ex-parte interim relief by which the respondents were restrained from evicting and dispossessing the petitioner from the suit premises in any manner whatsoever.

#. When the matter was called out yesterday, learned advocate for the petitioner did not remain present and the matter was adjourned to today. Today when the matter was called out in the first session, learned advocate for the petitioner did not remain present. Even in the second session, he has not chosen to remain present and therefore, we have heard the learned counsel for the Municipal Corporation, appearing in the matter.

#. In the petition, the petitioner has averred that on 1.1.1977 he was granted lease of the suit premises (cabin) at a monthly rent of Rs. 100/- exclusive of all taxes and other charges whichever may be leviable in future by the respondent no.2. The petitioner came out with a version that he had not raised any dispute in any forum for payment of rent to the landlord. However, he has averred that he was making payment regularly right from 1.1.77 to 30.9.88. He has further averred that the middle of the S.V.College Road, there is a "Salapas Road" which is of 28 feet excluding 7 feet of the ownership of Sarvodaya Commercial Centre i.e. the respondent no. 3 on the part of which the Pan Shop, i.e. cabin of the petitioner was placed. The petitioner further averred in para 5 that "the strip of 7 feet land on which the suit premises is situated is completely on the remote side and in a corner. It is in existence since 1977 and is still not acquired and taken possession over by the respondent no.1 for the purpose of road widening in pursuance of the implementation of the Town Planning Scheme in the walled city of Ahmedabad. The very strip of land is also not paved by concrete or otherwise by the respondent no. 1 or any other agency". The petitioner averred that with a view to maintain his business of a Pan Shop, the petitioner had to keep and maintain the cabin of the Pan Shop in a latest condition by means of renovation and modifications, so as to attract public at large. Thus, it is very clear that it was not a constructed premises

but it was a pan cabin. Not only that, but he has placed photographs on the record and from that it is very clear that it is merely a wooden cabin which is just adjacent to the wall of a building. Therefore, it cannot be a part and parcel of the building itself. The petitioner along with the petition has not placed any other material to substantiate his case that he was paying the rent.

#. On behalf of the Corporation, it is pointed out that on this very ground, the suit was filed by one Zafarali Mohamadkhan being Civil Suit No. 5200/88 before the City Civil Court, Ahmedabad. Notice of Motion was heard by the learned Chamber Judge and ultimately the Notice of Motion was dismissed on 9.12.88 and soon thereafter the present petition has been filed suppressing the material fact that the suit was filed in the City Civil Court, Ahmedabad and the same was dismissed. It is also required to be noted that the Corporation has also pointed out that on 30.9.88, cabin was removed as an encroachment and the cabin was handed over to the owner on 4.10.88 after taking removal charges from him. The sketch of the road produced on the record is clearly indicating that the cabin was placed on footpath, namely on the part of a public street and this was nothing but an encroachment. In para 7 of the reply affidavit, it is specifically stated that even today, there is no such galla existing on the site. Therefore, obviously, the petitioner seems to be not interested in the prosecution of this petition. The Apex Court as well as this Court have pointed out on number of occasions that people have no right to occupy the public street. The Apex Court has approved the scheme framed by the Ahmedabad Municipal Corporation, reference of which has been made in several decisions of this Court.

#. From the decisions in the cases of Ahmedabad Municipal Corporation v. Nawabkhan Gulabkhan and others, (AIR 1997 SC 152) and Olga Tellis and others v. Bombay Municipal Corporation and others (AIR 1986 SC 180), it is very clear that the encroachers have no right to remain on the public street or footpath and the public street or footpath is required to be kept open for the public for their movements. The Apex Court in the case of Olga Tellis (Supra) pointed out in para 28 as under.

> "Encroachment of public property undoubtedly obstructs and upsets planned development, ecology and sanitation. Public property needs to be preserved and protected. It is but the duty of the State and local bodies to ensure the same."

The Apex Court in the case of Nawabkhan Gulabkhan (Supra) pointed out in para 7 of the judgment as under.

"It is for the Court to decide in exercise of its constitutional power of judicial review whether the deprivation of life or personal liberty in a given case is by procedure which is reasonable, fair and just or it is otherwise. Footpath, street or pavement are public property which are intended to serve the convenience of general public. They are not laid for private use indeed, their use for a private purpose frustrates the very object for which they carved out from portions of public roads. ... No one has a right to make use of a public property for the private purpose without the requisite authorisation from the competent authority. It would, therefore, be but the duty of the competent authority to remove encroachments on the pavement or footpath of the public street obstructing free flow of traffic or passing or re-passing by the pedestrians."

We are of the view that in a matter like this, instead of granting exparte interim relief the court ought to have issued notice first and only after hearing the Corporation, the Court ought to have passed the order. In this matter, no material has been placed on record for claiming the rights. It is also required to be kept in mind that encroachment on road or footpath if permitted would cause more harm to the general public and individual citizen would find it difficult to raise his grievance about his right to use road or footpath being adversely affected.

#. The Honourable Supreme Court (Coram: M. Jagannadha Rao & M.B. Shah, JJ.), in the case of UNION OF INDIA vs. ERA EDUCATIONAL TRUST reported in (2000) 5 SCC 57, considered the case of establishment of a medical college and speaking for the Bench His Lordship Mr. Justice M.B. Shah pointed out in paragraph 5 of the judgment as under:

"Unfortunately, by granting this interim mandatory order, without allowing the respondents therein time to file a counter-affidavit, the Court not only violated the norms for grant of interim relief, but has also violated the

principles of natural justice and has allowed the petition on the date of its admission."

The Court in that case granted mandatory order. In paragraph 6 of the judgment, the Apex Court pointed out:

"It may be that order XXXIX CPC would not be applicable at the stage of granting interim relief in a petition under Article 226 or 227 of the Constitution, but at the same time various principles laid down under Order XXXIX for granting ad interim or interim reliefs are required to be taken into consideration."

#. The Court, in an appropriate case, may pass an exparte order; However, at the same time, considering the principles laid down by the Apex Court, if the Court is of the view that ad-interim exparte order is required to be passed, such order may be passed; However that should be for a limited period only so that on the returnable date, other party may point out correct facts and can point out whether the order is required to be modified, varied or vacated. By issuing rule, if interim relief is granted, the matter will be placed before the Court for final hearing in usual course. In matters where principle respondent is either Government or local authority or public body, it is noticed that in some cases either for want of care or negligence, the Court may not be moved for vacating the relief granted exparte, despite the fact that it causes lot of inconvenience to the public at large. With a view to avoid such mischief even if the Court is of the strong opinion, the Court may along with the notice returnable within a short period, grant ad-interim relief and should not grant interim relief while admitting the matter. The usual practice being followed since number of years is that while issuing a rule or admitting the appeal, ad-interim relief is granted for a short duration looking to the nature of the matter and the notice as to interim relief is made returnable. Public good is required to be borne in mind, which will be beneficial to the larger section of people. Individual right including fundamental right to the extent they erode public safety, public convenience, public health etc. have to be curtailed. This principle is required to be borne in mind in a case like this. One must bear in mind general interest of public at large than the individual interest who has approached the Court without adequate material. If opportunity would have been given at the earliest point of time, the Corporation would have placed before the Court relevant material.

Mr. P.G. Desai, learned counsel, appearing for the Corporation made a grievance about the courts passing orders exparte. It was the duty of the respondent Corporation to move the Court for vacating the relief which was granted exparte. Today, there is no encroachment and therefore, we do not say anything further. The petition stands dismissed with no orders as to costs. Rule is discharged. Ad-interim relief stands vacated.

(B.C. PATEL, J.)

(R.R. TRIPATHI, J.)